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JAMES H. McKENN

No. 248.

Brief of Lamb for D. C.

248

Filed May 2, 1898.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT.

KINGMAN & COMPANY,
Plaintiff in Error.

vs.

THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

WALTER J. LAMB,
Att'y for Defendant in Error.

JAMES H. McINTOSH,
Att'y for Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR.

IN THE

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KINGMAN & COMPANY,
Plaintiff in Error.

vs.

THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

The printed record fails to show any error in the judgment of the United States Circuit Court of appeals in this cause.

I.

The Court of appeals dismissed the appeal on the motion of this defendant, in which is assigned the following reasons:

1st. Because the Court has no jurisdiction of the said cause.

2nd. Because more than six months intervened between the date of the rendition of the judgment in said action and the date of allowing and taking out the writ of error in said cause.

3rd. Because more than six months intervened between the date of the rendition of judgment in said cause and the filing of any assignments of error in the said cause in the Circuit Court.

4th. Because more than six months intervened between the date of the entry of the judgment in said cause and the filing of the petition for writ of error in said cause in the Circuit Court.

5th. Because more than six months intervened between the date of the entry of the judgment in said cause and the time of filing the supersedeas bond in said cause.

6th. Because more than six months intervened between the date of the entry of judgment in said cause and the issuing of citation therein.

The statute of the United States applicable to the case, Section 11 of the act of March 3, 1891, which created the Court of appeals, and gave it the right to review the judgments of the Circuit Court provides.

"That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of appeals under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed."

26 Statutes 829 & 517.

1 Supp. Rev. Statutes, page 904.

The record shows, that the cause was tried and a verdict rendered at the May 1895 term of the Court, on the 4th day of June, 1895.

That on the same day a judgment was rendered in the cause upon the verdict, and execution awarded thereon in the following language:

JUDGMENT.

Western Manufacturing Company,
vs.
Kingman & Company.
} 226 Q.

The jury in this action having on this day rendered a verdict in favor of the plaintiff and against the defendnat herein for the sum of $1,996.66, on motion of said plaintiff by Lamb, Adams & Scott, its attorneys, it is considered, ordered and adjudged by the Court that said plaintiff is entitled to judgment on said verdict, and that said plaintiff, The Western Manufacturing Company, have and recover of and from
28 Kingman & Company the sum of nineteen hundred ninety-six dollars and sixty-six cents ($1,996.66), together with $.....costs herein expended and that execution issue therefor.

It will be observed that the judgment itself recites:

That it is rendered on the motion of Lamb, Adams & Scott the plaintiff's attorneys.

That the plaintiff is entitled to judgment on said verdict.

That it is formal, final and complete.

That execution is awarded upon it.

On the 6th day of June, a motion for a new trial was filed.

The record shows that nothing further was done in the cause at the May, 1895, term of the Court; that the defendant's attorney did nothing further; That he did not call the attention of the Court to the motion for a new trial; That the Court did not take the matter under advisement or take any further action in the cause during the May, 1895, term.

The Court will also notice that the next term of the Circuit Court for the District of Nebraska, was appointed for and held in Lincoln in October, 1895; that the Court took no action whatever in the cause at that term; nor was it asked to suspend, vacate or modify its judgment at any time.

Finally at the November, 1895, term of Court, on the 11th day of December, 1895, an order was made in the cause overruling the motion for a new trial.

On the 20th day of January, 1896, the assignments of errors and the petition for a writ of error were filed, and the writ of error allowed, and the citation issued, which were returned and filed January 22, 1896.

On the above record the Court of appeals dismissed the appeal.

II.

The record is presumed to show and does show the facts as they existed, that the attention of the Court was not called to the motion for a new trial during the May, 1895 term, nor yet during the October 1895, term, but that the same was submitted and argued on the 11th day of December, 1895; this was at the second term after the judgment was rendered, more

than six months after the date it was entered and after the time to appeal the cause had expired.

Certainly the plaintiff in error could not restore its right to appeal, which it had lost at that time, by calling for action of the Circuit Court upon a motion not recognized under the practice in the Federal Court when any action the Federal Court might take upon it was purely discretionary and not subject to review.

For the purposes of this argument we shall assume that the above record of a judgment in a law action is conclusive of what it unmistakably shows and that it shows the whole of the action of the Court in the premises. Black on judgments volume two section 505-509.

In actions at law unless there is a statute qualifying the effect of judgments, they are final and an estoppel for all purposes, notwithstanding a motion for a new trial is filed, or the pendency of proceedings intended to reverse or suspend their operation. Oregonian Railway Company vs. Oregon Ry. & Nav. Co. 27 Fed. Reporter 277.

The fact that a motion for a new trial is pending and undetermined in no way effects the operation of a judgment therein rendered as an estoppel since such a motion does not operate as a supersedeas or stay execution. Black on judgments vol. two, sec. 512. Young vs. Brehi, 12 Pac. Rep. page 564.

III.

The record shows that the Circuit Court lost jurisdiction over the judgment in this cause at the expiration of the May, 1895 term; this Court has stated the rule applicable, concisely, in the following language:

"It is the general rule of the law that all the judgments, decrees, or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that Court. Bronson vs. Schulten, 104 U. S. 410. But it is the rule equally well established, that after the term has ended all final judgments and decrees of the Courts pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision."

Phillips vs. Negley 117 U. S. R. 665.

Hickman vs. Fort Scott 145 U. S. R. 415.

IV.

The power to grant new trials in the Courts of the United States is given and limited by the judicial act of 24th September, 1789. It expressly declares in section 17, "that all the said Courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law, while by section 18 it is enacted, that when, in a Circuit Court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the Court and on such conditions, for the security of the adverse party, as they may judge proper, be stayed 42 days from the time of entering judgment, to give time to file in the Clerk's office of said Court a petition for a new trial. And if such petition be there filed within said term

of 42 days, with the certificate thereon from either of the Judges of such Court that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said Court. And if a new trial be granted the former judgment shall be thereby rendered void."

Chapter 20 first Statute at large. 73.

Now Congress having provided a mode under which at the time judgment is entered upon a verdict in a civil action, execution may be stayed on motion of a party, within the discretion of the Court, rendering the judgment upon giving such security to the adverse party as the judge thinks proper, and fixing 42 days from time of entering the judgment as time to file in the Clerk's office a petition for a new trial, and upon it being filed allowing a further stay of the execution until the next session of said Court, there is no other mode in the Circuit Court under which the absolute finality of the judgment and the plaintiffs right to the execution thereon can be defeated; and the Court is quite without the authority, having entered judgment upon the verdict, after that time to any way qualify it, or stay its effect, or deprive the plaintiff of an execution, except in accordance with the above act of Congress; certainly not after the term at which the judgment is rendered.

V.

Of course, the exception for error in the refusal to grant a new trial, is merely idle after the decisions of this Court, since

The Marion Insurance Company of Alexandria vs. Hodgson, 6th Cranch, 206.

Barr vs. Crath, 4th Wheaton, 213.

Blount vs. B. S. Smith, 7th Wheaton, 248.

Warner vs. Norton, 20th Howard, 448.

and the long line of authorities both in this Court and in the United States Courts of appeals following the foregoing; indeed as early as 1857, in the case of Doswll against De Le Lanza, et al., it is said that the refusal of the Court to grant a new trial is not a proper subject for a bill of exceptions; upon what legal or logical ground then, can it be argued, that the mere filing by counsel of a paper in a case the action of the Court upon which if it is afterward invoked, is purely and altogether discretionary, not subject to exception, bill of exceptions, writ of error or review, can take away the finality of a judgment in an action at law. How is the Circuit Court to know, or the Court of errors to ascertain, that the party filing such a paper ever intended to invoke the action of the trial Court upon it; the very fact that he did not do so until after the time for error or appeal from the judgment had expired, in itself creates a strong presumption against the person filing the motion.

"In regard to motions for new trials and bills of exceptions, Courts of the United States are independent of any statute or practice prevailing in the Courts of the State in which the trial was had."

"The overruling of a motion for a new trial is not a subject of exception according to the practice of the Courts of the United States."

Fishburn vs. Chicago, Milwaukee & St. Paul R. R. Co. 137 U. S. page 60.

Beaupre vs. Noyes, 138 U. S., 397.

M. P. R. R. Co. vs. Chicago & Aiton R. R. Co. 132 U. S. 191.

Newcomb vs. Wood, 97 U. S. page 581.

Indianapolis & St. Paul R. R. Co. vs. Horst, 93 U. S.

The question of the finality of a judgment for the purposes of appeal or error is not effected by state procedure.

Elder vs. McClashy. 70 Federal Rep. 529.

There are several cases, in point with the present, in the Circuit Courts of appeals, where the appeals have been dismissed because more than six months intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out writs of error.

U. S. vs. Baxtor. 51 Federal reporter, 624.

U. P. R. R. Co., vs. Col. Eastern Ry. Co. 54 Federal Reporter, pages 21 & 22.

Condran vs. Chi. M. & St. P. Ry. 67 Fed. Rep. page 1.

VI.

Counsel for the plaintiff in error, in his brief, makes some claim, but what does not very clearly appear, of a common law right under his motion for a new trial; while, of course, it is not needful to combat any such claim, we suggest that the plaintiff in error is not in a position to claim anything under the common law practice relative to new trials.

At common law, when the issue was one of fact, and a verdict was found, the Court for sufficient cause could grant a new trial but judgment could not be entered until the next term after the trial.

Blackstone says:

"If any defect of justice happened at the time, by sur-

prise, inadventure, or misconduct, the party may have relief *in the Court above* by obtaining a new trial."

3 Bl. Comm. (Sharsw. 386.)

Motion had to be made before judgment was signed.

Tidd's Pr. pp. 903-904. 912. 930.

Prior to 1598, any matter alleged as ground for new trial, must appear of record. Afterwards it was granted on the certificate of the judge, that in his opinion the verdict was wrong.

Slades case. Style, 138.

It would seem, that the practice adopted by the Federal statute requiring the certificate of the judge, may have had its origin in the common law practice.

The counsel's appeal, to the supposed practice in Nebraska and to the code of civil procedure of Nebraska as applicable to the case is not more fortunate, as under it final judgment was properly entered when it was.

Chapter four of the code of civil procedure provides,

Chapter IV.—MANNER OF GIVING AND ENTERING JUDGMENT.

Sec. 438. (UPON GENERAL VERDICT.) When a trial by jury has been had, judgment must be rendered by the clerk in conformity to the verdict, unless it is special, or the Court order the case to be reserved for future argument or consideration.

Sec. 439. (UPON SPECIAL FINDING—RESERVED CASE.) Where the verdict is special, or where there has been a

special finding on particular questions of fact, or where the Court has ordered the case to be reserved, it shall order what judgment shall be entered.

Page 1231 of the Revised Statutes of 1897.

The pendency of a motion for a new trial under the Code, does not operate to stay proceedings.

People vs. Louks, 28 California, 70.

Jones vs. Spear, 56 California, 164.

New Trial and Appeal, "Hayne" page 28, Sec. 3.

It is only when there is a statute or rule of Court, and the motion for a new trial is essential to obtain a review of errors occuring at the trial, that it can have any effect to stay final judgment.

Board of Com'rs vs. Gorman, 19 Wallace, 662.

We do not deem it necessary to discuss the cases in equity cited by the plaintiffs counsel, which are regulated by rule 88, under which where a petition in equity for a re-hearing is filed, *and is entertained*, the time in which to appeal does not begin to run until the same is disposed of.

We therefore contend with confidence that the record does not show any error was committed by the Court of appeals in dismissing the appeal in this action.

WALTER J. LAMB.
Attorney for Defendant.

OPINION

KINGMAN v. WESTERN MANUFACTURING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 248. Submitted May 4, 1898.—Decided May 23, 1898.

A judgment is not final, so that the jurisdiction of the Appellate Court may be invoked, while it is still under the control of the trial court, through the pendency of a motion for a new trial.

THE Western Manufacturing Company, a corporation of the State of Nebraska, brought its action against Kingman & Company, a corporation of the State of Illinois, in the Circuit Court of the United States for the District of Nebraska, seeking a recovery of various amounts, on four causes of action, and demanding judgment in the aggregate for the sum of $18,990. Such proceedings were had that the cause duly came on for trial before a jury at the May term, 1895, of said court, which resulted in a verdict on June 4, 1895, one of the days of that term, against Kingman & Company for the sum of $1996.66. On the coming in of the verdict, the court, according to the practice in that jurisdiction, at once rendered judgment on the verdict. On June 6, 1895, it being still the May term, Kingman & Company filed its motion to vacate and set aside the judgment and for a new trial of the cause, for various reasons therein stated. The motion was heard, and on December 11, 1895, being one of the days of the November term, 1895, of the court, was overruled by an order entered that day in the following terms: "This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties; whereupon, after careful consideration thereof and being fully advised in the premises, it is now on this day considered, ordered and adjudged by the court that said motion be, and the same is hereby, overruled, and

that the judgment heretofore entered herein be and remain absolute."

On the next day, December 12, one of the days of the November term, an order was entered giving Kingman & Company thirty days from that date "in which to prepare and present its bill of exceptions herein."

The bill of exceptions was duly served on the attorneys for the Western Manufacturing Company, and was by them endorsed: "Dec. 30, 1895. Returned without amendment;" was presented to the trial judge for his signature, and was by him duly allowed, signed and filed, January 11, 1896. The petition of Kingman & Company for writ of error and an assignment of errors was filed, the writ of error duly allowed and issued, bond approved and filed, and citation signed, all on January 20, 1896. The citation was served January 21 and returned, and filed January 22. The record was filed in the Circuit Court of Appeals for the Eighth Circuit March 14, 1896, and was printed. On the first day of May, 1896, the Western Manufacturing Company filed its motion in the Circuit Court of Appeals to dismiss the appeal because the court had no jurisdiction of the cause; and because more than six months had intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out the writ of error; of the filing of the petition for the writ of error; of the filing of the assignment of errors; of the filing of the bond; and of the service of the citation. This motion was sustained and the writ of error dismissed, with costs, for want of jurisdiction. A petition for rehearing was denied, and, thereafterward, a writ of certiorari was issued removing the cause to this court.

Mr. Walter J. Lamb for the Western Manufacturing Company.

Mr. James H. McIntosh for Kingman.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Opinion of the Court.

In *Aztec Mining Company* v. *Ripley*, 151 U. S. 79, it was held that this court had jurisdiction by appeal or writ of error to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question whether their judgments were made final by section six of the act of March 3, 1891, c. 517, 26 Stat. 826. The present case was one of the classes of cases in which the judgments of the Circuit Courts of Appeals were made final, and, therefore, the remedy was properly sought by certiorari.

By section eleven of that act it is provided that "no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

By section six the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit Courts, except where cases are carried, under section five, directly to this court, but by the seventh section, as amended by the act of February 19, 1895, c. 96, 28 Stat. 666, jurisdiction is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. *Kirwan* v. *Murphy*, 170 U. S. 205.

This provision is an exception to the general rule, and while the language of section eleven refers to the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees.

The question is, then, whether the judgment of which Kingman & Company complained became final for the purposes of a writ of error six months before the writ was sued out.

By section 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials "for reasons for which new trials have usually been granted in the courts of law;" and by section 987 provision is made where judgment had been entered on a verdict, or a finding of the court on the facts, for stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within that time, execution

was further stayed as of course; and "if a new trial be granted, the former judgment shall thereby be rendered void." These sections were brought forward from sections seventeen and eighteen of the original judiciary act of September 24, 1789, and the latter section is supplementary and additional to the other.

At common law motions for new trial were made before judgment, but under the statutes of many of the States judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.

By section 5889 of the Compiled Statutes of Nebraska applications for new trial must be made at the term when the verdict is rendered, (except on the ground of newly discovered evidence,) and within three days after verdict unless unavoidably prevented.

The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Manufacturing Co.*, 151 U. S. 135; *Brockett* v. *Brockett*, 2 How. 238, 249; *Texas and Pacific Railway* v. *Murphy*, 111 U. S. 488; *Memphis* v. *Brown*, 94 U. S. 715; *Northern Pacific Railroad* v. *Holmes*, 155 U. S. 137. In *Memphis* v. *Brown* the judgment was in mandamus, and a motion had been made to set it aside, which was denied, and thereupon the judgment was reëntered. The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably sued out within

section 1007, Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a supersedeas." No reference was made to any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed section 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial.

The subject was much considered by Judge McCrary in *Rutherford* v. *Penn Mutual Life Insurance Company*, 1 McCrary, 120, where he held that "a writ of error will operate as a supersedeas if duly served within sixty days, Sundays excluded, after a motion for new trial has been overruled," and by Judge Sabin in *Brown* v. *Evans*, 18 Fed. Rep. 56, where the same conclusion was reached, and it was held that where a motion for a new trial had been made and entertained, the judgment in the case did not become final and effectual for purposes of review until the date of the order of court overruling such motion. And see *Alexander* v. *United States*, 15 U. S. App. 158, 169; *Scott's Administrator* v. *Stockton*, 41 U. S. App. 579; *Andrews* v. *Thum*, 33 U. S. App. 430.

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error," said Chief Justice

Waite in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

And in *McLish* v. *Roff*, 141 U. S. 661, 665, it was observed by Mr. Justice Lamar: "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, (with the single exception of the provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The Circuit Courts of Appeals are governed by the same principles.

Unquestionably it is the general rule that after the expiration of the term all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control unless steps be taken during that term by motion or otherwise, to set aside, modify or correct them. *Hickman* v. *Fort Scott*, 141 U. S. 415. But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception.

It is true that a writ of error does not lie from this court or the Courts of Appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and, having power to grant the motion, the judgment is not final for the purpose of taking out the writ. The effect of a judgment, entered at once on the return of the verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial. We

do not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled.

The judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings.